FILE COPY

Office-Supreme Court, U.S.
FILED
OCT 15 1960
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. 341.

OTIS HILLARY RITCH,
Petitioner,

versus

NASHVILLE BRIDGE COMPANY,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

FRANK M. YOUNG, JR.,
804 First National Building,
Birmingham 3, Alabama,
Attorney for Respondent.

Of Counsel:

SPAIN, GILLON & YOUNG,
804 First National Building,
Birmingham 3, Alabama.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

Page

Statement of the case 1

Argument 4

Conclusion 16

Cases Cited.

Alabama Farm Bureau Mut. Cas. Ins. Co. v. Robinson, 269 Ala. 346 (113 So. 2d 140) 5

Brandwein v. Elliston, 268 Ala. 598 (109 So. 2d 687) 6

Byrd v. Blue Ridge Rural Elec. Coop. (decided 1958), 356 U. S. 525 (2 L. Ed. 2d 953) 9, 10, 11

Cobb v. Malone & Collins, 92 Ala. 630 (9 So. 738) 5

Comrs. of Marion County v. Clark, 94 U. S. 278 (24 L. Ed. 59) 4

Crowell v. Benson, 285 U. S. 22 (76 L. Ed. 598) 9

Dick v. New York Life Ins. Co., 359 U. S. 437 (3 L. Ed. 2d 935) 12

Erie R. Co. v. Tompkins, 304 U. S. 64 (82 L. Ed. 1188) 5, 7, 9, 10

Ewing v. Goode (C. C.), 78 Fed. 443 4

Franklin Fire Ins. Co. v. Slaton, 240 Ala. 560 (200 So. 564) 5, 7

Galloway v. United States, 319 U. S. 372 (87 L. Ed. 1458) 4, 13, 15

Guaranty Trust of New York v. York, 326 U. S. 99 (89 L. Ed. 2079) 9, 10, 11

Gunning v. Cooley, 281 U. S. 90 (74 L. Ed. 720) 4, 13

Harris v. Schmaeling, ... Ala. ... (120 So. 2d 731) .. 5

Herron v. Southern P. Co., 283 U. S. 91 (75 L. Ed. 857) 9, 10

Holderfield v. Deen, 269 Ala. 260 (112 So. 2d 448) 5, 6,

Johnson v. United States, 333 U. S. 46 (92 L. Ed. 468) 9

Ling v. Edenfield (C. C. A.-5, 1954), 211 F. 2d 705 11

Louis Pizitz Dry Goods Co. v. Harris, ... Ala. ... (118 So. 2d 727) 5

Louisville & N. R. Co. v. Hall, 223 Ala. 338 (135 So. 466) 11

Magenau v. Aetna Freight Lines (decided 1959), 360 U. S. 273 (3 L. Ed. 2d 1224) 9, 10, 11

Martin v. Burgess, 82 F. 2d 321 4

M'Lanahan v. The Universal Ins. Co., 26 U. S. 120 (7 L. Ed. 98) 13

National Surety Co. v. First Nat. Bank of Wetumpka, 224 Ala. 423 (140 So. 544) 15

New York Life Ins. Co. v. Zivitz, 243 Ala. 379 (10 So. 2d 276) 5

Parks v. Ross, 13 L. Ed. 730 13

Patton v. Texas & P. R. R. Co., 179 U. S. 658 (45 L. Ed. 361) 13

Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333 (77 L. Ed. 819) 9, 13

Pleasants v. Fant, 22 Wall. 116 (22 L. Ed. 780) 13

Pogue v. Great Atlantic & Pacific Tea Company (C. C. A.-5, 1957), 242 F. 2d 575 11

Quercia v. United States, 289 U. S. 466 (77 L. Ed. 1321) 9

Reuter v. Eastern Air Lines, Inc. (C. C. A.-5, 1955), 226 F. 2d 443 11

Robbins v. Battle House Co., 74 Ala. 499 15

Schaeffer v. Walker, 241 Ala. 530 (3 So. 2d 405) 5, 6

Schuylkill & D. Improv. & R. R. Co. v. Munson, 14 Wall. 442 (20 L. Ed. 867) 4

Sentilles v. Inter-Caribbean Shipping Corp., ... U. S. ... (4 L. Ed. 2d 142) 12

Slocum v. New York L. Ins. Co., 228 U. S. 364 (57 L. Ed. 879) 7

Small Co. v. Lamborn & Co., 267 U. S. 248 (69 L. Ed. 597) 4
Snow v. Allen, 227 Ala. 615 (151 So. 468) 5
Southern Apartments, Inc., v. Emmett, 269 Ala. 584 (114 So. 2d 453) 6
Stoner v. New York Life Ins. Co., 311 U. S. 464 (85 L. Ed. 284) 9
Tarter v. United States (D. C. Ky.), 17 F. Supp. 691 .. 13
Toomey v. London Railroad Co., 140 Eng. Rep. 694 4
White v. New York Life Ins. Co. (C. C. A.), 145 F. 2d 504 4
Wilkerson v. McCarthy, 336 U. S. 53 (93 L. Ed. 497) .. 9
Zayatz v. Southern Ry. Co., 248 Ala. 137 (26 So. 2d 545) 11

Textbooks Cited.

American Law Institute, Conflict of Laws, pp. 700-702 8
Beale's Conflict of Laws, Vol. III, para. 594.1 at p. 1607 8
Harvard Law Review, Vol. LVIII, p. 173 8
Harvard Law Review, Vol. LVIII, p. 178 ..... 4, 8
Moore's Federal Practice, para. 43.02 8
Moore's Federal Practice, para. 38.10 8

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. 341.

OTIS HILLARY RITCH,
Petitioner,

versus

NASHVILLE BRIDGE COMPANY,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE.

Petitioner's statement of the case needs amplifying to point out the additional significant facts.

There is no contention in the case that there were any hidden or latent defects in the load (R. 377). The loaded

gondola car was carried safely by the carrier (L & N[1]) from Respondent's plant at Bessemer, Alabama to Republic Steel Corporation's plant at Alabama City, Alabama (R. 88). After the car was loaded by Respondent's employees it was inspected by a representative of L & N at Respondent's Bessemer plant, with no exceptions taken to the load (R. 136-137). It then passed through the L & N yards at Boyles, Alabama and was subjected to the regular routine inspection by car inspectors of the L & N, and no exceptions were taken to the load or any defects discovered (R. 136-137). After delivery of the car by L & N at its Gadsden, Alabama yard there is no record of any exceptions or any defects in the load (R. 138). Upon delivery of the car to Republic Steel Corporation at Alabama City there were no exceptions noted or any defects noted in the load (R. 246-249).

The Mechanical Engineer, White, employed by Petitioner as an expert in statics, testified that it would be harder to keep the girders from shifting in transit if they were put nearer the center of the car; they would be more prone to shift if they were in that position (R. 352). He further testified that with a girder loaded near each side of the car, the car won't turn over (R. 353). All of Petitioner's witnesses testified that loading a girder on each side of the gondola car resulted in the load being substantially balanced. Petitioner admitted that when one girder was removed from the car it sagged a little (R. 303); that he felt the car shake when the little girder was taken out (R. 303). He knew that if enough weight was placed on one side of the car, with the 27-ton girder overhanging on the side, it would turn over (R. 306). He was an experienced man in unloading heavy loads (R. 309) and knew a balanced load from an unbalanced load (R. 309). Sufficient material was available, consisting of cross-ties

[1] Louisville & Nashville Railroad Company.

and heavy oak beams, to shore up the car (R. 305). He further admitted that if you put cribs under the remaining 27-ton girder, overhanging on one side of the car, "it would be just like putting pillows under a house" and without any pillows, "it is like a house without any foundation" (R. 311).

The witness O'Neal, the General Superintendent of Industrial Steel, the consignee of the shipment and charged with the duty of unloading the girders, testified that he knew as much or more about loading and unloading steel beams and girders than the shipper (R. 361). He further testified that Respondent's method of loading the girders constituted a good loading practice; it was the usual and customary practice followed by his company (R. 357).

Petitioner testified that he was doing lighter work since he returned to work on the 18th day of March, 1957 (R. 295) but was making more money than he formerly made before the accident (R. 300).

ARGUMENT.

The Respondent points out—

A. The state law will not destroy the entire Federal system with respect to the allocation of trial functions between judge and jury.

B. The Fifth Circuit's action in reversing Petitioner's judgment and rendering judgment for Respondent does not consfitute a denial of Petitioner's rights under the Seventh Amendment to the Constitution.

POINT A.

Alabama is the only state in the union which follows the former common law scintilla rule. South Carolina applies it in a modified form.[2] This rule was adopted in this country as a part of the English common law. However, in 1857[3] the English Courts abandoned the rule and this Court abandoned the rule in 1872.[4] The Federal Courts have again and again refused to apply the scintilla rule.[5] Although under the Alabama practice a scintilla of evidence will justify the submission of a case to a jury, nevertheless, the Trial Court and the Appellate Courts are duty-bound to set the verdict aside if it is— 1) not supported by the evidence, 2) contrary to the great weight of the evidence; or 3) if the verdict fails to do justice

---

[2] Volume LVIII, Harvard Law Review, p. 178.

[3] *Toomey v. London Railroad Co.*, 140 Eng. Rep. 694.

[4] *Schuylkill & D. Improv. & R. R. Co. v. Munson*, 14 Wall. 442 (20 L. Ed. 867).

[5] *Gunning v. Cooley*, 281 U. S. 90 (74 L. Ed. 720); *Galloway v. United States*, 319 U. S. 372 (87 L. Ed. 1458); *Comrs. of Marion County v. Clark*, 94 U. S. 278 (24 L. Ed. 59); *Small v. Lamborn & Co.*, 267 U. S. 248 (69 L. Ed. 597); *Ewing v. Goode* (C. C.), 78 Fed. 443; *White v. New York Life Ins. Co.* (C. C. A.), 145 F. 2d 504; *Martin v. Burgess*, 82 F. 2d 321.

between the parties.[6] A scintilla of evidence will send a case to an Alabama jury, but it is not sufficient to support the verdict.

Petitioner, in effect, argues that after **Erie**[7] the Federal Courts should hold that regardless of the probative value of the evidence, a jury verdict should not be disturbed if it is supported by a mere "gleam", "glimmer", "spark", "the least particle" or the "smallest trace"—a scintilla. This is even contrary to the Alabama system of allocating the trial functions between judge and jury. Under the prevailing Alabama system a trial judge must submit the case to the jury if the plaintiff's charge is supported by a mere scintilla of evidence, notwithstanding the Court knows at the time that it is duty-bound to set the verdict aside on a proper motion if the verdict is against the weight of the evidence or if the verdict fails to do justice between the parties. Should the trial judge fail to set the verdict aside, then the Appellate Courts of Alabama are charged with this duty.[8]

The three Alabama cases cited by Petitioner on page 10 of his brief do not support his proposition that the judgment of a Trial Court is due to be affirmed if supported only by a scintilla of evidence so long as it does not conflict with the great weight of the evidence. In **Louis Pizitz Dry Goods Co. v. Harris**, ... Ala. ... (118 So. 2d

---

[6] *Cobb v. Malone & Collins*, 92 Ala. 630 (9 So. 738); *New York Life Ins. Co. v. Zivitz*, 243 Ala. 379 (10 So. 2d 276); *Snow v. Allen*, 227 Ala. 615 (151 So. 468); *Harris v. Schmacling*, ... Ala. ... (120 So. 2d 731); *Alabama Farm Bureau Mut. Cas. Ins. Co. v. Robinson*, 269 Ala. 346 (113 So. 2d 140); *Schaefer v. Walker*, 241 Ala. 530 (3 So. 2d 405); *Holderfield v. Deen*, 269 Ala. 260 (112 So. 2d 448).

[7] *Erie R. Co. v. Tompkins*, 304 U. S. 64 (82 L. Ed. 1188).

[8] *New York Life Ins. Co. v. Zivitz*, supra; *Snow v. Allen*, supra; *Harris v. Schmacling*, supra (decided May 19, 1960); *Cobb v. Malone*, supra; *Franklin Fire Ins. Co. v. Slaton*, 240 Ala. 560 (200 So. 564).

727), the motion for a new trial dealt solely with the asserted excessiveness of the verdict; in **Southern Apartments, Inc., v. Emmett**, 269 Ala. 584 (114 So. 2d 453), there is no reference to the proposition urged by Petitioner; in **Brandwein v. Elliston**, 268 Ala. 598 (109 So. 2d 687), the Court merely announced the classic scintilla rule prevailing in Alabama.

Alabama also recognizes and applies a common law cause for granting a new trial, that is, where the verdict fails to do justice between the parties. This rule was announced in **Schaeffer v. Walker**, 241 Ala. 530 (3 So. 2d 405), where the Court expresses the rule as follows:

> "It is the duty of the trial court to set aside a verdict and grant a new trial, though the evidence is in conflict, if the trial court has a definite and well-considered opinion from the evidence that the verdict failed to do justice under the proper pleadings directing and guiding the trial. * * *"

In 1959 the Alabama Supreme Court in **Holderfield v. Deen**, 269 Ala. 260 (112 So. 2d 448), reaffirmed the **Schaeffer** principle that Alabama recognized the common law cause for granting a new trial as distinguished from the statutory grounds. The following language was used:

> "Code 1940, Tit. 7, § 276, sets out certain causes for granting a new trial. Among them is the following: 'That the verdict or decision is not sustained by the great preponderance of the evidence, * * *.' It should be noted, however, that we have held that the causes enumerated in § 276 are not the exclusive causes for granting a new trial; that 'courts of record have inherent power independent of the statute to set aside and vacate their orders and judgment within the term and for common-law causes.' * * * A common law cause for granting a new trial is that the verdict failed to do justice between the parties. * * *."

In Alabama the jury is not the sole judge of the sufficiency of the evidence to sustain their verdict. The Supreme Court of Alabama in **Franklin Fire Ins. Co. v. Slaton**, 240 Ala. 560 (200 So. 564), announced this principle.[3]

The Federal Rules of Civil Procedure were adopted to simplify legal procedure in the Federal Courts, eliminate technicalities, and expedite litigation. The Alabama system which, on the one hand, adheres to the scintilla rule and, on the other hand, places the duty on the judge and the Appellate Courts to set the verdict aside under the circumstances mentioned in this brief, is hostile to the spirit and purposes of the Federal Rules of Civil Procedure. The Alabama system, instead of expediting litigation, tends to prolong litigation. In a sense, the Alabama system is "shadow boxing". The end results are the same as the Federal system—the only difference is Alabama takes several technical steps to arrive at that end, whereas under the Federal system, it is handled in one step.

It is apparent that even though the Federal system does not recognize the scintilla rule and Alabama does, under either system the verdict must be supported by probative evidence.

If this Court should hold that the Alabama test is entirely different from the Federal test, then under **Erie**

---

[3] The Court, in *Franklin Fire Ins. Co.*, supra, in announcing this principle, among other cases cited *Slocum v. New York L. Ins. Co.*, 228 U. S. 364 (57 L. Ed. 879), and held as follows:

> "It is within the peculiar province of the jury to determine the credibility of the evidence, reconcile conflicts therein, where possible, draw legitimate inferences therefrom, find the facts, apply the facts to the law as given in charge and express their conclusion in their verdict. However, the jury is not the 'sole judge' of the sufficiency of the evidence to sustain their verdict. The power to review their conclusion in civil actions at law is vested in the trial court in the first instance, and in this court on appeal. * * *"

the whole Alabama system must be followed, which would require the Appellate Court to weigh the evidence and determine the weight of the evidence before ruling on a motion for a new trial. This is contrary to the Federal system.[10]

Petitioner asserts on page 11 of his brief that the question of the sufficiency of the evidence is a substantive one and that this was the sole question considered by the Fifth Circuit in this case. Concededly, there is some confusion as to what is procedural and what is substantive. It is generally regarded that the method of proving a claim and rules of evidence should be treated within the domain of procedural law. This Court had recognized this principle before the advent of the Rules and was acted upon by the Court by the promulgated rules number 43 and 44 relating to the evidence.[11]

---

[10] For general discussion of the Alabama scintilla rule, see Volume LVIII, Harvard Law Review, p. 178.

For a discussion of *Erie-Tompkins* on the question of the "sufficiency of the evidence," see Volume LVIII, Harvard Law Review, p. 173.

[11] American Law Institute, Conflict of Laws, pp. 700-702; Volume Three of Beale's Conflict of Laws, para. 594.1 at p. 1607; Volume LVIII, Harvard Law Review, commencing p. 178; 5 Moore's F. P. 43.02 (2), p. 1310.

In 5 Moore's F. P., para. 38.10, the treatise deals with "the effect of *Erie-Tompkins* on sufficiency of evidence to present question for jury." In 5 Moore's F. P., para. 43.02 (4), pp. 1314, 1315, the treatise provides:

> "As heretofore noted the relation of state law to federal evidentiary development prior to Erie v. Tompkins and the Federal Rules revolved principally around the conformity statutes. In the field of actions at law there was good authority to the effect that the Conformity Act was controlling in matters of evidence but in general the courts looked to the Rules of Decision Act. Since both acts were in force it made little difference which was regarded as controlling. Erie v. Tompkins undoubtedly introduced a new way of looking at law, but at the same time a fair balance is to be held between procedure and substance and a fair working area left for the Federal Rules and such other rules as may properly be promulgated."

The question of "sufficiency of the evidence" to support a verdict is inseparably connected with the Federal system of distributing trial functions between judge and jury. Petitioner would now have this Court recognize the scintilla rule, which the Federal Courts have again and again denounced; and also, under the guise of **Erie-Tompkins**, destroy the entire Federal system with respect to the allocation of trial functions between judge and jury.

Petitioner attempts to brush aside the Court's holding in **Herron v. Southern P. Co.**, 283 U. S. 91 (75 L. Ed. 857), stating that since **Erie-Tompkins, Herron** is irrelevant. This statement is not borne out by the Court's decision where it has cited **Herron**, supra, approvingly in numerous cases.[12] The latest two cases are **Byrd v. Blue Ridge Rural Elec. Coop.** (decided 1958), 356 U. S. 525 (2 L. Ed. 2d 953) and **Magenau v. Aetna Freight Lines** (decided 1959), 360 U. S. 273 (3 L. Ed. 2d 1224). **Byrd** and **Magenau** were both decided after **Erie, Stoner** and **Guaranty Trust.**[13] In **Herron**, supra, an action brought in the United States District Court for the District of Arizona, the Court directed a verdict for the defendant upon the ground that the plaintiff was guilty of contributory negligence, which action was contrary to the Arizona Constitution providing that the defense of contributory negligence or the assumption of risk in all cases should be submitted to a jury. The Court refused to be bound by the Arizona Constitution and upheld the action of the

[12] *Johnson v. United States*, 333 U. S. 46 (92 L. Ed. 468); *Quercia v. United States*, 289 U. S. 466 (77 L. Ed. 1321); *Croxell v. Benson*, 285 U. S. 22 (76 L. Ed. 598); *Wilkerson v. McCarthy*, 336 U. S. 53 (93 L. Ed. 497); *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333 (77 L. Ed. 819); *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U. S. 525 (2 L. Ed. 2d 953); *Magenau v. Aetna Freight Lines*, 360 U. S. 273 (3 L. Ed. 2d 1224).

[13] *Stoner v. New York Life Ins. Co.*, 311 U. S. 464 (85 L. Ed. 284); *Guaranty Trust of New York v. York*, 326 U. S. 99 (89 L. Ed. 2079).

district judge in directing a verdict.[14] True this case was decided before **Erie-Tompkins**, but after **Swift v. Tyson.**[14a]

In **Byrd**, supra, the Court refused to follow the South Carolina workmen's compensation statute requiring certain factual matters to be decided by the judge. The Court cites **Herron**, supra, and comments on **Guaranty Trust**, supra, and fails to follow **Guaranty Trust** but follows **Herron.**[15] **Byrd** is cited with approval by the Court in the later case of **Magenau**, supra.

---

[14] In *Herron*, supra, the Court said

"In a trial by jury in a Federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. This discharge of the judicial function as at common law is an essential factor in the process for which the Federal Constitution provides. * * * but it is a trial by a jury of twelve men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. * * *"

[14a] 16 Peters 1 (10 L. Ed. 865).

[15] The Court used the following language:

"* * * It may well be that in the instant personal-injury case the outcome would be substantially affected by whether the issue of immunity is decided by a judge or a jury. Therefore, were 'outcome' the only consideration, a strong case might appear for saying that the federal court should follow the state practice.

"But there are affirmative countervailing considerations at work here. The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury. Jacob v. New York, 315 U. S. 752, 86 L. ed. 1166, 62 S. Ct. 854. The policy of uniform enforcement of state-created rights and obligations, see, e. g., Guaranty Trust Co. v. York (U. S.), supra, cannot in every case exact compliance with a state rule—not bound up with rights and obligations—which disrupts the federal system of allocating functions between

Petitioner relies on **Guaranty Trust**, supra, in support of his argument that the outcome of the case in the Federal Court should be the same as the outcome of the case in the State Court. However, in **Byrd**, supra, the Court held—"outcome is not the only consideration and criterion". **Byrd**, supra, and **Magenau**, supra, are the latest decisions of this Court on the point. They destroy the efficacy of Petitioner's criticism of **Herron** as well as his criticism of **Reuter, Ling** and **Pogue**[16] (pages 12 and 13 of Petitioner's brief).

The **Southern Railway Co.** case and **L & N** case cited on page 14 of Petitioner's brief[17] are not significant as they relate to the Federal Employer's Liability Act.

Petitioner makes a spurious argument on pages 13 and 14 of his brief concerning the "jammed dockets" in the Courts in the Fifth Circuit resulting from forum shopping excursions of litigants in diversity cases. The panacea offered by Petitioner is that the Fifth Circuit follow the rule announced in **Guaranty Trust.** In making this argument Petitioner overlooks **Byrd**, which followed **Herron** but failed to follow **Guaranty Trust.** Petitioner, in effect, argues that the Fifth Circuit should recognize the scintilla rule prevailing in Alabama. Again we point out that Alabama is the only state applying the strict scintilla rule. The cases arising in the only state in the Fifth Circuit ap-

judge and jury. Herron v. Southern P. Co., 283 U. S. 91, 75 L. ed. 857, 51 S. Ct. 383. * * * "

"We think that in the circumstances of this case the federal court should not follow the state rule. It cannot be gainsaid that there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts. * * *".

[16] *Reuter v. Eastern Air Lines, Inc.* (C. C. A.-5, 1955), 226 F. 2d 443; *Ling v. Edenfield* (C. C. A.-5, 1954), 211 F. 2d 705; *Pogue v. Great Atlantic & Pacific Tea Company* (C. C. A.-5, 1957), 242 F. 2d 575.

[17] *Zayatz v. Southern Ry. Co.*, 248 Ala. 137 (26 So. 2d 545); *Louisville & N. R. Co. v. Hall*, 223 Ala. 338 (135 So. 466).

plying the rule would not tend to eliminate the number of cases indicated by Petitioner.

The issues posed are not of such special and important nature as to burden this Court. There is presented here only "another fact case".

POINT B.

Petitioner seeks a review of his individualized personal injury case, in which the sole issue is the sufficiency of the evidence, and makes a specious argument that he has been denied his rights under the Seventh Amendment resulting from the Fifth Circuit's action in reversing and rendering the judgment. He contends he has "a bundle of rights" when, in fact, all he presents is "a bundle of complaints".

In order that he may have another day in court he criticizes the Fifth Circuit; he urges, in effect, that if he gets another day in court that the entire administrative policy of the Fifth Circuit will be changed. In effect, he concedes by his argument although he had only a modicum of proof, nonetheless, the action of the Fifth Circuit in reversing and rendering this cause impinged his rights under the Seventh Amendment.

This Court has repeatedly announced that it was not concerned with the individualized personal injury cases in which the sole issue was the sufficiency of the evidence. That its proper function related to issues which were of greater public moment and of national importance.[18]

---

[18] See Justice Frankfurter's separate opinion in *Dick v. New York Life Ins. Co.*, 359 U. S. 437 (3 L. Ed. 2d 935);

Justice Stewart's opinion in *Scutilles v. Inter-Caribbean Shipping Corp.*, ... U. S. ... (4 L. Ed. 2d 142).

Justice Frankfurter, in *Dick*, supra, stated:

> "* * * Fabulous inflation cannot turn these conventional motions turning on appreciation of evidence into constitutional issues, nor can the many diversity cases sought to be brought here on contested questions of evidentiary weight be similarly transformed by insisting before this Court that the

This Court, over a hundred years ago, recognized the right of the Court to give a directed verdict and by doing so, constitutional rights were not impinged.[19]

This Court, as early as 1828, recognized that Federal judges are empowered to comment on the evidence to the jury, thereby enlarging the Federal judges' influence on the jury.[20]

This Court is committed to the principle that before evidence is submitted to a jury, the preliminary question for the judge is to determine whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, not whether there is little or no evidence. Also, where evidence is so overwhelming on one side as to leave no room to doubt what the fact is, the Court should give a preemptory instruction to the jury.[21]

It is undisputed that the car was carried safely from Bessemer, Alabama to Alabama City, Alabama (R. 88). It was twice inspected by representatives of the L & N

Constitution has been violated. This verbal smoke screen cannot obscure the truth that all that is involved is an appraisal of the fair inferences to be drawn from the evidence. * * *"

[19] *Parks v. Ross*, 13 L. Ed. 730.

[20] *M'Lanahan v. The Universal Ins. Co.*, 26 U. S. 120 (7 L. Ed. 98).

Justice Black, in his dissent in *Galloway v. United States*, 319 U. S. 372 (87 L. Ed. 1458), stated that the district judge in *Tarter v. United States* (D. C. Ky.), 17 F. Supp. 691, represented his views with respect to the Seventh Amendment to the Constitution insofar as guaranteeing a jury trial in law cases. The district judge stated:

"The Seventh Amendment to the Constitution guarantees a jury trial in law cases, where there is *substantial evidence to support the claim of the plaintiff in an action.* * * *" (Emphasis ours.)

[21] *Pennsylvania R. Co. v. Chamberlain*, supra; *Gunning v. Cooley*, supra; *Patton v. Texas & P. R. R. Co.*, 179 U. S. 658 (45 L. Ed. 361); *Pleasants v. Fant*, 22 Wall. 116 (22 L. Ed. 780).

and no defects were found in the loading. The trial judge declared there was no latent defect in the load (R. 377). The car was again inspected at Gadsden, Alabama, by L. & N representatives and nothing was found wrong (R. 138). Another inspection was made by Republic Steel Corporation at its Alabama City, Alabama, yards and nothing was found wrong with the load (R. 246-249). This is evidence of substantial probative value as to condition of the load and the method of loading. This evidence comes from four parties, none of whom were connected with Respondent.

Petitioner contends that his witness, Vance, was an expert; however, he doesn't contend that he was an expert in statics. Petitioner's expert witness in statics, White, testified that if the girders were loaded according to Vance's theory, that it would be harder to keep them from shifting in transit than as the girders were loaded (R. 352). The witness White also testified that with the girders loaded near each side of the car, the car wouldn't turn over in transit (R. 353). The most that can be said of Petitioner's evidence of negligence came from the witnesses Vance and White. We have here pointed out that White's testimony is favorable rather than unfavorable. The Court correctly paraphrases Vance's testimony when it says—"Taken as a whole, is that different shippers use different methods of loading; that each shipper thought his method was best; **and that Vance thought that any method of loading except his own was improper.** Impropriety, according to the opinion of one such witness, is not sufficient to establish liability." (Emphasis ours.) (Page 40, Petitioner's brief.)

Petitioner contends that Respondent should have furnished the consignee with instructions for unloading. The law never requires a needless act.[22]

---

[22] The General Superintendent of the consignee (Industrial Steel) who was charged with the duty of unloading the girders

Petitioner, on page 23 of his brief, asserts—"There can likewise be no reasonable question but that if warning had been given or unloading instructions forwarded, the injury would not have occurred." The consignee admits he knew as much about the load and the unloading thereof as the shipper. Furthermore, the Petitioner had full knowledge of the conditions of the car and the dangers encountered in unloading (R. 310-311). Petitioner was an experienced man in unloading heavy loads and could tell a balanced load from an unbalanced load (R. 309). **He knew that if considerable weight was placed on one side of the car, with the 27-ton girder overhanging on the other side, it would turn over** (R. 306).

In the face of this positive evidence Petitioner urges that the Fifth Circuit's action deprived him of his constitutional rights under the Seventh Amendment.

This Court, in **Galloway v. United States**, 319 U. S. 372 (87 L. Ed. 1458), announced the following rule:

> "* * * If the intention is to claim generally that the Amendment (7th Amendment to the Constitution of the United States) (preserving the right of trial by jury) deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century. * * *"

This Court should not be called upon to comb the evidence. The Fifth Circuit has done this; and after apply-

---

testified that he knew as much or more about loading and unloading steel beams and girders than the shipper (R. 361). Would one who knew as much or more than the shipper about loading and unloading follow any instructions which might have been given by the shipper.

Kolbins v. Battle House Co., 74 Ala. 400; *National Surety Co. v. First Nat. Bank of Wetumpka*, 224 Ala. 423 (140 So. 544).

ing correct rules and standards, reversed and rendered this cause.

CONCLUSION.

We submit that the sole issue in this case is the sufficiency of the evidence to support Petitioner's personal injury case. It is of interest only to Petitioner and does not, under a smoke screen, present any constitutional issue.

The petition is not supported by a sound "Reason" calling for the exercise of this high Court's power and it should, therefore, be denied.

Respectfully submitted,

.....

FRANK M. YOUNG, JR.,
Attorney for Respondent.

Of Counsel:

SPAIN, GILLON & YOUNG,
804 First National Building,
Birmingham 3, Alabama.

Certificate of Service.

I, Frank M. Young, Jr., Attorney for Respondent in this cause, certify that I have mailed a true copy of the foregoing Brief, postage prepaid, to the Honorable Robert S. Vance, of Counsel for Petitioner, at 1703 Comer Building, Birmingham, Alabama, on this the ... day of October, 1960.

.....

Frank M. Young, Jr.,
Attorney for Respondent.